**SATISH MOHANADRAN v. PP**

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
LEE HENG CHEONG JCA
AHMAD NASFY YASIN JCA
[CRIMINAL APPEAL NO: M-05(M)-509-10-2018]
15 FEBRUARY 2022

**Abstract** – *The prosecution, having availed impeachment proceedings and failed, cannot submit on the falsity of the version offered by a witness that survives impeachment. In the event that a witness's credibility is preserved and found credible, the evidence of the contradictory witness must be evaluated and tested carefully. It gives rise to a doubt on the credibility of the contradictory witness to the extent that that evidence may be rejected in totality on the contradicted particulars.*

***CRIMINAL PROCEDURE:*** *Appeal – Conviction and sentence – Accused charged with four charges in relation to trafficking and possession of drugs – Accused found guilty, convicted as per charges and sentenced to imprisonment, strokes of rotan and death – Whether prosecution had proven possession in light of two conflicting versions of evidence adduced by prosecution – Whether prosecution excluded presence of another occupier of house where drugs were found – Whether accused alone during raid – Whether trial judge erred in requiring accused to rebut presumption under ss. 37(d) and 37(da)(i) and (ii) of Dangerous Drugs Act 1952 – Whether prima facie case established – Whether accused's defence probable – Whether conviction and sentence safe – Dangerous Drugs Act 1952, ss. 6, 12(2), 39A(1) & 39B(1)(a)*

The police had carried out a raid on a house and a search led to drugs being found in various parts of the premises. The appellant was charged at the High Court for (i) trafficking in 24.49g of heroin and monoacetylmorphines, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act') ('first charge'); (ii) possession of 4.22g of monoacetylmorephines and heroin, an offence under s. 39A(1) of the Act ('second charge'); (iii) possession of 19.64g of methamphetamine, an offence under s. 12(2) of the Act ('third charge'); and (iv) possession of 6.41g of cannabis, an offence under s. 6 of the Act ('fourth charge'). It was the prosecution's case that the appellant was alone at the house and, through the testimony of a police inspector ('SP4'), that the drugs were found in various parts of the house. However, according to the appellant's wife ('SP9'), she was present during the police raid and there was nothing incriminating found in the house until another police officer ('SP8') brought in a plastic container from outside the house. In light of the contradictions, the prosecution commenced impeachment proceedings

against SP9. The trial judge ruled that SP9's credibility was preserved. Satisfied that a *prima facie* case had been established, the trial judge proceeded to call upon the appellant to enter his defence. In his defence, the appellant submitted that (i) he had no knowledge of the drugs; (ii) during the police raid, he was not alone as SP9 was with him; (iii) there was another occupier of the house, Vicky; and (iv) SP8 had brought in drugs in a plastic container. At the conclusion of the trial, the appellant was found guilty, convicted for the offences as per the charges and sentenced to: (i) death for the first charge; (ii) four years' imprisonment and seven strokes of rotan for the second charge; (iii) three years' imprisonment and four strokes of rotan for the third charge; and (iv) a fine of RM20,000 for the fourth charge. Hence, the present appeal on the grounds that the trial judge erred in (i) finding that the prosecution had proven possession as (a) there were two conflicting versions of evidence, namely the evidence by SP4 and SP9; and (b) the presence of Vicky which the prosecution had not excluded; (ii) requiring the appellant to rebut the presumption under ss. 37(d) and 37(da)(i) of the Act; and (iii) failing to appreciate the appellant's defence.

**Held (allowing appeal)**
**Per Ahmad Nasfy Yasin JCA delivering the judgment of the court:**

**(1)** The prosecution had adduced two conflicting versions of evidence – one striking against the other – which went to the heart of the prosecution's case and, on this ground alone, it could not be said that a *prima facie* case had been made out by the prosecution. Consequent to the surviving of the impeachment proceedings, (i) the witness' credibility was preserved and, accordingly, credible; and (ii) the evidence of the contradictory witness must be evaluated and tested carefully. It certainly gave rise to a doubt on the credibility of the contradictory witness to the extent that that evidence may be rejected in totality on the contradicted particulars. The prosecution, having availed the impeachment proceedings and failed, could not then submit on the falsity of the version offered by the witness that survived impeachment. This should be applied with greater rigour when the conflicting evidence comes from the prosecution's witness. SP4's credibility having been compromised, the prosecution's case was killed by its own witness and, in consequence, there was no reliable evidence that the drugs were found inside the house. (para 36)

**(2)** The essence of the appellant's defence, which had also been put forth during the prosecution's case, was that Vicky was also an occupier in the house. The investigating officer confirmed that the appellant had informed this fact during investigations. SP9 testified that Vicky, whose real name was Vicknesh, rented one of the rooms upstairs for two to three weeks, prior to the police raid, and had the keys to the house. The

landlord confirmed that he saw an Indian man in the house when he went there to collect rental. The prosecution failed to exclude Vicky to the drugs and, as such, failure on the part of the trial judge to consider the unchallenged evidence amounted to a serious misdirection. (paras 37-39)

**(3)** The trial judge ruled that there was actual possession, having discussed custody and knowledge. However, in the same breath, the trial judge invoked the presumption of presumed knowledge and possession under s. 37(d) of the Act. The approach taken by the trial judge was erroneous. The appellant was prejudiced. The trial judge adverted to both presumptions under s. 37(d) and (da) of the Act without electing whether the appellant was found to be in actual possession of the drugs and was presumed to be trafficking under s. 37(da) or whether the appellant was presumed to be in possession of the drugs under s. 37(d) and found to be trafficking under s. 37(da) of the Act. It was most undesirable as it reflected the uncertainty on the part of the trial judge in making a finding. (paras 40 & 41)

**(4)** The trial judge failed to consider material evidence which, if considered, would cast a doubt on the prosecution's version that the appellant was alone in the house and the drugs were found inside the house. Their evidence would enhance the credibility of the appellant and SP9. There was a serious omission which resulted in a serious miscarriage of justice. (para 44)

**(5)** The convictions recorded against the appellant on all four charges were not safe and, along with the sentences, were set aside. The appellant was acquitted and discharged on all four charges. (para 45)

**Case(s) referred to:**
*Adzhaar Ahmad & Anor v. PP [1996] 1 LNS 68 HC* ***(refd)***
*Chan Wei Loon v. PP & Another Appeal [2021] 6 CLJ 623 FC* ***(refd)***
*Mohamad Hanafi Mohamad Hashim v. PP [2016] 6 CLJ 378 CA* ***(refd)***
*Olier Shekh Awoyal Shekh v. PR [2017] 2 CLJ 141 FC* ***(refd)***
*PP v. Chia Leong Foo [2000] 4 CLJ 649 HC* ***(refd)***
*Seyedalireza Seyedhedayatollah Enteshamiardestani v. PP [2014] 4 CLJ 406 CA* ***(refd)***
*Zulkefly Had lwn. PP & Satu Lagi Rayuan [2014] 6 CLJ 64 FC* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, s. 182A
Dangerous Drugs Act 1952, ss. 2, 6, 37(d), (da)(i), (iii), 39A(1), 39B(2)

*For the appellant - Hisyam Teh Poh Teik & Low Wei Lok; M/s Hisyam Teh*
*For the respondent - Nurul Farhana Khalid; DPP*

*[Editor's note: Appeal from High Court, Melaka; Criminal Trial Nos: 45A-18-06-2016 & 45A-19-06-2016 (overruled).]*

*Reported by Najib Tamby*

## JUDGMENT

**Ahmad Nasfy Yasin JCA:**

### Introduction

**[1]** Satish a/l Mohanadran, the appellant, was charged before Melaka High Court with the following offences:

**First Charge**

Bahawa pada 08.01.2016 jam lebih kurang 1.30 pagi, di No. 54, Jalan M21, Taman Merdeka, Hang Tuah Jaya, 75350 Melaka di dalam daerah Melaka Tengah, di dalam negeri Melaka, telah mengedar dadah berbahaya iaitu Heroin dan Monoacetylmorphines seberat 24.49 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s.39B(2) Akta yang sama.

**Second Charge**

Bahawa pada 08.01.2016 jam lebih kurang 1.30 pagi, di No. 54, Jalan M21, Taman Merdeka, Hang Tuah Jaya, 75350 Melaka di dalam daerah Melaka Tengah, di dalam negeri Melaka, telah memiliki dadah berbahaya iaitu Monoacetylorphines dan Heroin seberat 4.22 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah s. 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39A(1) Akta yang sama.

**Third Charge**

Bahawa pada 08.01.2016 jam lebih kurang 1.30 pagi di No. 54, Jalan M21, Taman Merdeka, Hang Tuah Jaya, 75350 Melaka di dalam daerah Melaka Tengah, di dalam negeri Melaka, telah memiliki dadah yang berbahaya iaitu Methamphetamine seberat 19.64 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah s. 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39A(1) Akta yang sama.

**Fourth Charge**

Bahawa pada 08.01.2016 jam lebih kurang 1.30 pagi, di No. 54, Jalan M21, Taman Merdeka Tengah, di dalam negeri Melaka telah memiliki dadah berbahaya jenis Cannabis seberat 6.41 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah s. 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 6 Akta yang sama.

**[2]** At the end of the trial, the appellant was found guilty, convicted and sentenced for all the charges proffered against him as the followings:

(i) first charge: Section 39B(2) DDA 1952 sentenced to death;

(ii) second charge: Section 39A(1) DDA 1952, sentenced to four years imprisonment and seven strokes of rotan;

(iii) third charge: Section 39A(1) DDA 1952 sentenced to three years imprisonment and four strokes of rotan; and

(iv) fourth charge: Section 6 DDA 1952 sentenced to fine in the sum of RM20,000 in default one year imprisonment and three years imprisonment.

The sentence of imprisonment was to run concurrently from the date of arrest.

**[3]** Aggrieved, the appellant appealed to this court against his conviction and sentence. We heard the appeal. After due consideration of the issues raised and the submission made in support thereof, we allowed the appeal. We set aside the convictions and sentence passed by the High Court on all charges and substituted in its place an order for acquittal and discharge on each of the charges. We now give our reasons in allowing the appeal.

**The Case For The Prosecution**

**[4]** The prosecution's case was well encapsulated in the learned trial judge's grounds. So, we are spared the task of having to repeat them save where necessary.

**[5]** Acting on information received, on 8 January 2016 at about 1.30am, SP4 (Inspector Yugesh a/l Mathivanan) led a police party comprising seven other personnel namely Sjn. Zainuddin bin Rahmat (SP6), Kpl. Mohd Herman bin Zaini (SP10), Kpl. Abdul Malik bin Awang Long (SP7), L/Kpl. Mohd Hairyzad bin Ahmad (SP8) and three other detectives. A raid took place at a house having address at No. 54, Jalan M21, Taman Merdeka, Hang Tuah Jaya, 75350 Melaka.

**[6]** Prior to the raid, when SP4 and his team arrived at the location, they conducted surveillance. After about ten minutes of observing and finding that no suspicious individual was seen entering or coming out of the house, SP4 and his team moved into the compound of the said house, while the other two detectives secured the parameters of the house.

**[7]** On arrival at the front of the house, SP4 found the grille and the door were locked. SP4 knocked the door and the appellant answered the door. After introducing himself and his team as police personnel, SP4 directed the appellant to open the door and the grille which he complied.

**[8]** A search was conducted in the living room in the presence of the appellant. It was the prosecution's version that the appellant was alone in the house and the drugs were found in different parts of the house, namely, on the TV rack, under the sofa in the living room and in the kitchen cabinet.

**[9]** On the TV rack, SP6 found a "zipped bag" with the word "New Tong Chong Goldsmith & Jewellery" (P4A) containing 16 packets of substances suspected to be dangerous drugs (P4(A1-A16). This was later confirmed by the chemist (SP3) to be 24.49g of heroin and monoacetylmorphines, the subject matter of the first charge.

**[10]** SP10 also found on the same TV rack one packet of transparent plastic bag containing a compressed slab of plant material suspected to be cannabis (exh. P4A(B)). It was later confirmed to be 6.41g of cannabis, the subject matter of the fourth charge.

**[11]** On further search at the living room, SP7 and L/Kpl. 162579 recovered under the sofa, an envelope with the words "Selamat Hari Raya Aidilfitri" containing six plastic packets of substances suspected to be dangerous drugs. It was later confirmed by the chemist (SP3) to contain 19.64g of Methamphetamines, the subject matter of the third charge (P4A (C1-C6)).

**[12]** Upon subsequent search in the kitchen cabinet, SP4 and SP8 recovered a plastic container containing two packets of transparent plastic. Inside the same was a substance suspected to be dangerous drugs which later was confirmed by SP3 to contain 4.22g of monoacetylmorphines and heroin, the subject matter of the second charge (P4A(D)).

**[13]** According to SP4, he also seized from the appellant two sets of keys of the front door and grille, with the word "Propilot" and "Meiko" respectively. The appellant was then arrested, and the substances suspected to be dangerous drugs and the compressed slabs of plant material suspected to be cannabis were seized. The appellant and the drugs seized were subsequently brought by SP4 to Pejabat Narkotik Melaka Tengah. Upon arrival, SP4 did the marking on all the items seized. He also prepared the search list and then handed them over to the investigation officer, SP11. As regard to the house, evidence subsequently revealed that the said house was rented by the appellant from SP5, the landlord (Sreedran a/l Kannan Chettiar).

**[14]** The said exhibits were later sent to the chemist, Puan Azmira binti Abd Rahman for analysis (SP3). She confirmed that upon analysis, the substances were heroin, methamphetamines and monoacetylmorphines which are dangerous drugs listed under the First Schedule of the Act. Whilst a compressed slab of plant material was cannabis as defined under s. 2 of the Act. Chemist report produced and tendered as exh. P9.

**Finding Of The Learned Judge At The End Of Prosecution's Case**

**[15]** At the end of the prosecution's case, the learned trial judge held that the prosecution had succeeded in proving a *prima facie* case against the appellant. The learned trial judge had accepted the testimony of SP3 on the

drugs analysis undertaken by the said witness. The learned trial judge then concluded that there was no defect in SP3's analysis and there were no serious challenges made by the defence on the identity and weight of the impugned drugs. There was also no break in the chain of evidence regarding the impugned drugs which were produced and identified by the prosecution's witnesses in court.

**[16]** As for the element of possession, the learned trial judge accepted the evidence of SP4, SP6, SP7, SP8, SP9 and SP10, that the appellant was together with his wife and their child at the time the SP4 and team raided the house. The learned trial judge's finding can be gleaned from encl. 32 at p. 19. In essence:

> Menurut keterangan pihak pendakwaan pada masa serbuan tiada orang berada dalam rumah tersebut kecuali OKT. Daripada keterangan dan fakta kes menunjukkan kepada mahkamah bahawa OKT berada bersama isteri dan anak kecilnya. Mahkamah mendapati OKT mempunyai kawalan ke atas rumah tersebut.
>
> Barang-barang kes yang dikemukakan dalam kes ini adalah barang-barang yang dijumpai di dalam rumah OKT iaitu berikutan serbuan yang dibuat oleh pihak polis pada 8.1.2016 di rumah tersebut. Keterangan menunjukkan bahawa barang-barang kes yang dijumpai di rumah tempat kejadian berada dalam "custody" OKT.

**[17]** As regards the presence of one Vicky who allegedly occupied the said house, the learned trial judge had made the following findings as at p. 20 of the grounds:

> Terdapat keterangan daripada SP9 (isteri OKT) bahawa terdapat seorang bernama Vicky yang menyewa di rumah tersebut. Walau bagaimanapun, perkara ini tidak dinyatakan oleh tuan rumah tersebut iaitu SP5. SP5 hanya bersetuju pada soalan balas peguambela bahawa terdapat seorang lelaki India berada bersama OKT semasa SP5 berjumpa OKT di rumah tersebut. Merujuk kepada keterangan SP5, hanya OKT sahaja yang memiliki kunci rumah dalam kes ini. Mengenai penyewa lain di rumah tersebut iaitu Vicky yang dikatakan oleh OKT dan isterinya, tiada apa-apa keterangan dibangkitkan oleh pihak pembelaan kepada pihak pendakwaan yang boleh menunjukkan kepada Mahkamah mengenai kehadiran penyewa lain atau apa-apa yang dapat mengaitkan rumah tersebut dengan seorang penyewa (jika ada) selain daripada OKT di mana-mana bahagian rumah terebut. OKT mahupun isterinya tidak menunjukkan di manakah bilik yang dikatakan disewakan kepada orang lain itu. Sekiranya ada, sudah tentu akan ditunjukkan kepada pengadu mahupun mana-mana ahli pasukan serbuan.

**[18]** The learned trial judge was well aware of the alleged conflicting versions between SP4 and SP9's testimonies in respect of the place where the drugs were found. In summary, according to SP4, SP6, SP7, SP8 and SP10 the drugs were found in the following places in the house:

(i) SP6 (D/Sjn. Zainuddin bin Rahmat) found a zipped bag, with the words "New Tong Goldsmith Jewellery on the TV rack in the hall and inside it was found to contain 16 plastic packets containing substances to be heroin;

(ii) SP10 (D/Kpl. Mohd Herman bin Zaini) found a transparent plastic packet containing dried vegetable material suspected to be cannabis on top of the TV rack;

(iii) SP7 (D/Kpl. Abdul Malik bin Awang) and L/Kpl. Hafiz found a green Raya packet with the words "Selamat Hari Raya Aidilfitri" printed on it under the sofa in the hall. Upon inspection, the green Raya packet contains six plastic packets of substances suspected to be syabu; and

(iv) SP4 together with SP8 (L/Kpl. Mohd Hairyzad bin Ahmad) found a blue plastic container from the kitchen cabinet. In it were two plastic packets suspected to contain heroin.

Whilst SP9 (Premavathy), the wife of the appellant said in her evidence the followings:

(i) that she was present during the police raid;

(ii) that nothing incriminating was found in the house; and

(iii) that SP8 brought in the blue plastic container from outside the house.

**[19]** SP9's testimony contradicted the version of events by the prosecution, as such an impeachment proceeding was commenced against her. In her s. 112's statement, SP9 had stated that on the night in question she was not at the said house with the appellant but was instead at the babysitter's house.

**[20]** The learned trial judge held that the discrepancy was material and accordingly allowed the prosecution to proceed with the impeachment proceedings against SP9. SP9 explained the discrepancy in this manner:

> Ya, saya nampak statement yang bagi tu memang tak betul, memang tak betul, masa kejadian saya berada di rumah saya sendiri. Saya bagi statement tu terpaksa oleh pihak polis, jika saya tidak bekerjasama dengan pihak polis, dia orang bagi tahu saya, saya dengan anak 11 bulan tu kena tahan juga. So saya terpaksa bagi statement tu, macam sebegitu.

**[21]** At the end of the prosecution's case, the learned trial judge accepted her explanation and ruled that her credibility was preserved. The impeachment failed.

**[22]** In the upshot, the learned trial judge had made the following findings:

At p. 21 of the grounds:

Berhubung testimoni saksi-saksi pendakwaan iaitu SP4, SP6, SP7, SP8 dan SP10, mahkamah telah menerima keterangan mereka setelah memberi pertimbangan kepada faktor kredibiliti saksi-saksi tersebut. Daripada keterangan yang ada dalam rekod mahkamah didapati saksi-saksi ini tiada isu atau "bad blood" terhadap OKT, tidak bersengketa dengan OKT mahupun ahli keluarganya dan tiada kepentingan atas keputusan dalam kes ini.

At p. 24 of the grounds:

Sehubungan dengan prosiding pencabaran yang telah dijalankan dalam kes ini, mahkamah mendapati kredibiliti isteri adalah terpelihara. Dengan itu, keterangannya boleh diberi pertimbangan sama ada boleh ataupun setakat mana ianya dapat menyokong pembelaan OKT kelak jika pembelaan dipanggil.

**[23]** However, the learned trial judge was satisfied that the prosecution had proven a *prima facie* case and that the appellant has custody and control of the drugs, relying on s. 37(d) of the Act and that there is ample evidence for the court to draw an inference that the appellant knew the contents in the zipped bag written with the word "New Tong Chong Gold Smith & Jewellery" (exh. P4A), one packet of transparent plastic bag (exh. P4A(B), an envelope written with the words "Selamat Hari Raya Aidilfitri (exh. PA (C1-C6)) and two packets of transparent plastic (exh. PA(D)). Hence, the appellant was called upon to enter his defence on the preferred charges.

**The Appellant's Defence**

**[24]** The appellant elected to give evidence under oath. In his evidence, the appellant stated that he had no knowledge of the drugs and as such could not be said to be in possession of the same. Although the appellant was the tenant, there was another occupier. His name is Vicky. It was the appellant's version that at the time of the police raid and search, his wife, SP9 was with him and witnessed the search. The appellant contends that the drugs in the blue plastic container were brought in the house by SP8 (Kpl. Hairyzad) and this was confirmed by SP9.

**Findings Of The Learned Judge At The End Of The Defence Case**

**[25]** After considering the defence version, the learned trial judge found that the appellant had not succeeded in raising any reasonable doubt on the prosecution's case.

**[26]** The material part of the learned trial judge's finding at the end of the defence case can be gleaned from the following passages:

> At page 30 of the Grounds:
>
> Mahkamah mendapati kesemua barang-barang kes lain yang merupakan barang-barang kes utama yang 'implicate' OKT dalam pertuduhan terhadap OKT gagal dipertikaikan (kecuali bekas biru tersebut) dan OKT gagal menimbulkan keraguan munasabah mengenainya.
>
> Mengenai Vicky, tuan rumah iaitu SP5 tidak pernah memaklumkan dia menyewakan rumahnya ataupun mana-mana bahagian daripada rumahnya dalam kes ini kepada Vicky. Apabila ditanya, SP5 cuma pernah menyetujui dalam soalan balasan daripada peguambela terpelajar bagi pihak OKT bahawa terdapat seorang lelaki India bersama OKT semasa beliau berjumpa OKT di rumahnya itu. Tiada keterangan yang dikemukakan untuk menunjukkan lelaki tersebut adalah Vicky.
>
> Walau bagaimanapun, mahkamah mendapati keterangan isteri OKT gagal menimbulkan keraguan munasabah ke atas kes pendakwaan dengan mengatakan bahawa dadah-dadah dalam kes ini telah dibawa masuk oleh pasukan serbuan daripada luar rumah ke dalam rumah semasa serbuan dibuat di rumah tempat kejadian.

**[27]** Upon invocation of presumption under s. 37(d) at the end of prosecution's case and s. 37(da)(i) and (ii) of the Act at the end of defence case, the learned trial judge had ruled that the appellant failed to rebut both the presumption on possession and trafficking respectively. The appellant was thus convicted and sentenced, as alluded at paragraph two above.

**The Appeal Before Us**

**[28]** Before us, learned counsel for the appellant had canvassed three broad grounds of appeal, namely:

(i) that the learned trial judge erred in finding that the prosecution had proven possession;

(ii) that the learned trial judge erred in requiring the appellant to rebut the presumption under s. 37(d) and s. 37(da)(i) and (ii); and

(iii) that learned trial judge failed to sufficiently appreciate the defence of the appellant.

**Our Findings**

*First Issue: Possession*

**[29]** The main argument before us centred on the issue of possession. It was the contention of learned counsel for the appellant that the prosecution has not proven that the appellant was in possession of the impugned drugs. The reasons are as follows:

(i) The prosecution has adduced two conflicting versions of evidence; and

(ii) The presence of Vicky which the prosecution has not excluded.

**[30]** Learned counsel pointed out that the evidence of SP4 (Insp. Yugesh) compared with that of SP9 (Premavathy) are striking at each other. Both SP4 and SP9 are the prosecution's witnesses. SP4's version was that upon a search made, the drugs were found in the following places in the house:

(i) SP6 (D/Sjn. Zainuddin bin Rahmat) found a zipped bag written with words "New Tong Goldsmith and Jewellery" on the TV rack in the hall. Upon inspection, the said zipped bag contains 16 plastic packets of substances suspected to be heroin;

(ii) SP10 (D/Kpl. Mohd Herman bin Zaini) found a transparent plastic packet containing dried vegetable material suspected to be cannabis on the TV rack;

(iii) SP7 (D/Kpl. Abdul Malik bin Awang) and L/Kpl. Hafiz found a green Raya packet with the word "Selamat Hari Raya Aidilfitri" printed on it under the sofa in the hall, and inside it were six plastic packets of substances suspected to be syabu; and

(iv) SP4 together with SP8 (L/Kpl. Mohd Hairyzad bin Ahmad) found a blue plastic container from the kitchen cabinet. In it were two plastic packets suspected to contain heroin.

**[31]** Subsequently, SP4 and his team did a search on all the three bedrooms and a bathroom on the upper floor of the said house but no drugs were recovered. SP4's version was supported by SP6, SP7 and SP8 in SP4's team.

**[32]** However, the above version was contradicted by prosecution's other witness, namely SP9 (Premavathy), the wife of the appellant. We found that SP9 had contradicted SP4's evidence in material aspects, especially the following:

(i) that she was present during the police raid (see pp. 210, 251, AR vol. 2(2)). At p. 210 vol. 2(2) SP9 said:

> Pada 8.1.2016 midnight 1.30am macam tu saya berada di rumah Taman Merdeka dengan suami dengan anak 11 bulan;

(ii) that nothing incriminating was found in the house (see p. 252 AR vol. 2(2)). She said as follows:

> Tiada apa-apa barang salah mereka jumpai, Yang Arif;

(iii) that SP8 brought in the blue plastic container from outside the house (see p. 252-253 AR vol. 2(2)). She continued as follows:

> Dan tiba-tiba seorang masuk ke dalam rumah, Yang Arif daripada luar dan saya melihat dia ada memegang satu kotak Tupperware, Yang Arif berwarna biru.

**[33]** By reason of SP9's evidence, we are mindful to state that the case for the prosecution is completely compromised. From the above extract of SP9's evidence, it is apparent that SP9 had flatly contradicted the evidence of SP4 on the material particulars.

**[34]** In light of the above contradictions, the prosecution then commenced the impeachment proceedings against SP9. As in her s. 112 statement, SP9 stated that on the night in question she was not at the said house with the appellant but was in the house of the babysitter. To reiterate, the learned trial judge found the discrepancy was material and accordingly allowed the prosecution to proceed with the impeachment. SP9 explained the discrepancy in this manner:

> Ya, saya nampak. Statement yang saya bagi tu memang tak betul, memang tak betul, masa kejadian saya berada di rumah saya sendiri. Saya bagi statement tu terpaksa oleh pihak polis, jika saya tidak bekerjasama dengan pihak polis, dia orang bagi tahu saya, saya dengan anak 11 bulan tu kena tahan juga. So, saya terpaksa bagi statement tu, macam sebegitu. (see page 229 Vol. 2(2)).

**[35]** As mentioned earlier, at the end of the prosecution's case, the learned trial judge accepted her explanation and ruled that her credibility was preserved (see p. 367 AR vol. 2(2)). This was stated by the learned trial judge in her written grounds (see pp. 23-24 vol. 1)).

**[36]** From the above, it is patently clear that the prosecution has adduced two conflicting versions of evidence one striking at each other. We find no reason to disagree with learned counsel's submission that the conflicting evidence goes to the heart of the prosecution's case and on this ground alone it cannot be said that a *prima facie* has been made out by the prosecution and the case cited, *Adzhaar Ahmad & Anor v. PP* [1996] 1 LNS 68; [1996] 4 MLJ 85 is relevant and on point on the consequences of surviving the impeachment proceedings. For one, the witness's credibility is preserved and accordingly, that witness's evidence is credible. For the other, the evidence of the contradictory witness must be evaluated and tested carefully. It certainly gives rise to a doubt on the credibility of the contradictory witness to the extent that that evidence may be rejected in totality on the contradicted particulars. The reason is simple: that the prosecution, having availed the impeachment proceedings and failed cannot thereafter submit on the falsity of the version offered by the witness that survived impeachment. This, in our judgment, should be applied with greater rigour when the conflicting evidence comes from the prosecution's witness. In the present case, to put it in a less elegant language SP4's credibility has been compromised, the prosecution's case is killed by its own witness and in consequence, no reliable evidence that the drugs, which were the subject of the four charges, were found inside the said house.

*The Presence Of Vicky*

**[37]** The essence of the defence which had also been put forth during the prosecution's case was that Vicky was also an occupier in the said house. The investigating officer (SP11) has confirmed that the appellant had informed this fact in his statement during investigations (see pp. 318-319 AR vol. 2(2)). SP9 also mentioned that Vicky stayed in the house. She testified that his name is Vicknesh but was called Vicky. He rented one of the rooms upstairs for two-three weeks prior to the police raid. Vicky got keys to the house. What is said by SP9 in her cross-examination at pp. 259-260 AR vol. 2(2) is reproduced below:

S: Pn Prema ya, you setuju dengan saya ya dekat rumah tu juga ada kawan-kawan kepada suami boleh masuk dalam rumah tu, setuju? Boleh datang ke rumah.

J: Yang Arif ada seorang kawan kepada suami saya menyewa bilik di rumah tu, Yang Arif.

S: Menyewa bilik ya?

J: Ya.

S: Setuju namanya Vicky?

J: Ya, nama dia Viknish. Dan Nama panggilan Vicky, Yang Arif.

S: Dah berapa lama dia sewa dekat situ?

J: Selama 2 hingga 3 minggu, Yang Arif.

S: 2 hingga 3 minggu sebelum suami ditangkap, setuju?

J: Ya.

S: Disewa di bilik mana?

J: Bilik tingkat atas, Yang Arif.

**[38]** In addition, SP9 identified the photograph as Vicky's room (see p. 41 AR vol. 3). We found that the learned trial judge had failed to recognise that SP9 is a prosecution witness. Further, the landlord had also (SP5) confirmed that he saw a male Indian in the house when he went there to collect rental (see p. 114 AR vol. 2(1)). In *Chan Wei Loon v. PP & Another Appeal* [2021] 6 CLJ 623; [2021] MLJU 770), the Federal Court ruled as follows:

> [93] The evidence laid down above pinpoints the access possibility by the third party to the ground floor. It is trite that the burden is on the prosecution to exclude access of the said ground floor by others to prove that the appellants were exclusively in custody and control of the dangerous drugs and the machines found on the ground floor. The prosecution had failed to establish such evidence when the onus is not

A on the defence to prove possibility of access by others but on the prosecution to exclude such possibility. The burden of proving its case at every stage lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the truth of the prosecution's case (see *Mohan Singh a/l Lachman Singh v. Public Prosecutor* [2002] 3 MLJ 291).

B **[39]** In this regard, we are of the view that the learned trial judge failed to appreciate that the prosecution had failed to exclude Vicky to the drugs which according to SP4 were found in the living room and the kitchen. As such, to our mind, failure on the part of the trial judge to consider the foregoing unchallenged evidence amounted to a serious misdirection warranting appellate intervention.

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*Issue 2 – The Wrongful Use Of The Presumption*

**[40]** As borne out by the passage at p. 22 AR vol. 1 in the grounds of judgment, the learned trial judge had ruled that there was actual possession, having discussed custody and knowledge. However, on the same breath at the

D following paragraph at p. 31 AR vol. 1, the learned trial judge invoked the presumption of presumed knowledge and possession under s. 37(d) of the Act. In our view, the approach taken by the learned trial judge is clearly erroneous. Indeed, the appellant is prejudiced when the learned trial judge after having ruled the actual possession, required the appellant to rebut the

E presumption under s. 37(d) of the Act. In this regard, it is our considered view that the learned trial judge had failed to recognise that the law does not allow a case of actual possession and at the same time relied on presumed possession. (see *Seyedalireza Seyedhedayatollah Enteshamiardestani v. PP* [2014] 4 CLJ 406; [2014] 6 MLJ 408, *Mohamad Hanafi Mohamad Hashim v. PP*

F [2016] 6 CLJ 378; [2016] 3 MLJ 723).

**[41]** Thereafter, the learned trial judge in respect to the first charge of 24.49g had invoked presumptions under s. 37(da)(i) and (iii) of the Act. Again, this is a most serious error. In short, the learned trial judge had adverted to both presumptions under s. 37(d) and (da) of the Act without

G electing whether the appellant was found to be in actual possession of the drugs and was presumed to be trafficking under s. 37(da) or whether the appellant was presumed to be in possession of the drugs under s. 37(d) and found to be trafficking under s. 37(da) of the Act. It is most undesirable as it reflects the uncertainty on the part of the trial judge in making a finding

H (see *PP v. Chia Leong Foo* [2000] 4 CLJ 649; [2000] 6 MLJ 705).

*Issue 3 – Failure To Appreciate The Defence Of The Appellant*

**[42]** It is trite that under s. 182A of the Criminal Procedure Code, the judge must consider all the evidence presented at trial. In the instant case the appellant had called the following defence witnesses:

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(i) Rosini a/p Vasigaran (SD2);

(ii) S. Menaga s/p Subramaniam (SP3); and

(iii) Jeeva a/l P. Narayanan SD4.

**[43]** Upon perusal of the note of evidence, we found that the following evidence to be material:

(i) that on 8 January 2016, SD2 received a call from the appellant to go to the Melaka Tengah Police Station to pick up his wife and child (see p. 402 AR vol. 2(3));

(ii) SD2 said at p. 408 AR vol. 2(3) that she heard a policeman telling SP9 that if someone takes a statement from her to say she had a fight with her husband and was staying in SD2's house;

(iii) SD3 confirmed that she was the babysitter and on 8 January 2016 SP9 and her child were staying in their own house (see p. 417 AR vol. 2(3)); and

(iv) SD4 at p. 429 AR vol. 2(3) confirmed SD2's evidence that they went to the police station to bring home SP9 and her child. At p. 430 AR vol. 2(3) she further said on 8 January 2016, SP9 and her child were staying with the appellant.

**[44]** In the upshot, we found that the above material evidence was never been considered by the learned trial judge. If considered, it will definitely cast a doubt on the prosecution's version that the appellant was alone in the house and the drugs were found inside the house. Their evidence will enhance the credibility of both SP9 and the appellant. Thus, in our view, this is a serious omission which has resulted in a serious miscarriage of justice warranting appellate intervention (see *Olier Shekh Awoyal Shekh v. PR* [2017] 2 CLJ 141, *Zulkefly Had lwn. PP & Satu Lagi Rayuan* [2014] 6 CLJ 64). With respect, we found that the learned trial judge had breached the statutory provision of s. 182A of the CPC and the fundamental legal principle which formed the cornerstone of criminal justice trial that the defence of an accused must be fairly and justly considered.

## Conclusion

**[45]** Upon careful perusal of the record of appeal, the evidence and the judgment under appeal, we find the convictions recorded against the appellant on all four charges are not safe. It was for all the reasons aforesaid that we unanimously allowed the appellant's appeals. Accordingly, the conviction and sentence of all four charges are set aside and the appellant is acquitted and discharged of all four charges.